BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENTS ON BEHALF OF STUDENT,

v.

ADELANTO ELEMENTARY SCHOOL DISTRICT AND VICTOR VALLEY UNION HIGH SCHOOL DISTRCT.

OAH CASE NUMBER 2021020060

ORDER TO SHOW CAUSE AS TO WHY STUDENT'S ATTORNEY SHOULD NOT BE ORDERED TO PAY COSTS FOR FAILING TO APPEAR FOR PREHEARING CONFERENCE AND DISMISSAL OF COMPLAINT AND CONTINUANCE

JULY 19, 2021

On February 1, 2021, Student filed a due process hearing complaint with the Office of Administrative Hearings, called OAH, naming Adelanto Elementary School District and Victor Valley Union High School District as respondents. OAH granted three continuances and two mediations in this matter and set the prehearing conference for July 16, 2021, and the due process hearing to begin July 27, 2021. The administrative

law judge that granted the third continuance ordered "no further continuance requests will be considered unless supported by a showing of exceptionally good cause through declarations executed under penalty of perjury."

On July 16, 2021, at 10:00 a.m., the undersigned administrative law judge attempted to convene the prehearing conference. Attorney Rikesha Lane appeared on behalf of Adelanto Elementary School District and Victor Valley Union High School District and filed a prehearing conference statement. Student's counsel, Leejanice Toback, failed to file a prehearing conference statement and appear for the prehearing conference. Five attempts were made to contact Student's counsel at the telephone number listed on Student's due process hearing complaint, as counsel failed to file a participation information sheet for any scheduled prehearing conference in this matter as required. However, there was no answer, and four messages were left, approximately 5 minutes apart. Thus, the prehearing conference could not be convened.

If the parent and local education agency have not resolved the due process complaint within 30 days of the receipt of the complaint, OAH is required to issue a decision within the next 45 days, unless a continuance is granted for good cause. (20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.51; Ed. Code, § 56502, subd. (f).)

An administrative law judge presiding over a hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, subd. (a).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking a contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

"Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) "Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit [citations]." (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635.) In addition, there must be a showing of improper purpose. (*Ibid.*) A finding of "bad faith" does not require a determination of evil motive. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

Given the short time frames applicable to this case, it is critical that the parties follow orders issued by OAH and participate in advancing the matter to hearing or resolution. Student's counsel's non-compliance with procedure and failure to participate put the timely resolution of this matter in doubt. As the attorney of record, Toback is responsible for understanding and following OAH's procedures, including making all required appearances. Failure to do so may result in the complaint being dismissed.

Given the lengthy delays in this matter, Toback is ordered to show cause and file a declaration with OAH no later than 5:00 p.m. on July 20, 2021, explaining the failure to appear at the prehearing conference on July 16, 2021, why Toback should not be ordered to pay costs incurred by respondents, and dismissal of the complaint for lack of prosecution. If respondents seek cost shifting, respondents must file a response and declaration no later than 5:00 p.m. on July 21, 2021.

Failure of Toback to submit a declaration and the prehearing conference statement by 5:00 p.m. on July 20, 2021, may result in a dismissal of this matter and other consequences, up to and including the shifting of costs.

The matter is deemed continued pending resolution of the Order to Show Cause. If Toback successfully demonstrates good cause for the failure to appear such that the matter proceeds, it will be set as follows:

Prehearing conference, Friday July 23, 2021, at 3:00 PM.

Due process hearing: August 3, 4, and 5, 2021.

Student is on notice that if a timely response to the Order to Show Cause is not received, or cause is not established, the matter will be dismissed via separate order and the scheduled dates vacated.

ORDER

Student's attorney must file a declaration under penalty of perjury no later than 5:00 p.m. on July 20, 2021, explaining the failure to appear at the July 16, 2021 prehearing conference, and why costs should not be shifted and dismissal of this matter.

Cynthia Fritz

Cynthia Fritz
Administrative Law Judge
Office of Administrative Hearings